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THE TARDINESS OF JUSTICE.

IN the parable of the Unjust Judge, his injustice consisted in putting off an action, not in making a wrong decision. It was harder for the suitor to be kept in uncertainty than to know positively that one could have no redress. In later times the law's delay was one of the evils against which relief was promised in *Magna Charta*. *Nulli * * * differemus rectum vel justitiam*. And it was one of the troubles that Shakespeare names as almost an excuse for suicide; a quietus with a bare bodkin. The evil continues at the present day. In most things we move more rapidly than former generations did. We travel faster; we send messages across the ocean in a few minutes; we transact business of large amounts in a short time; but when we come to our litigations, we find the reproach of the law's delay still existing. We have done very little to remedy this great wrong; indeed, it is doubtful whether in this matter we have not gone backward. Lords Kenyon and Ellenborough "tried cases at the rate of twenty-five a day. The very last day that Lord Ellenborough sat at Guildhall, when he was laboring under great infirmity and weakness, he tried seventeen defended cases." ("Life of Lord Abinger.") Contrast this with the proceedings at the present day, when one case may last a week or more; or where, as in the famous case in Brooklyn, months may be consumed in one trial. Thus, too, in criminal cases. A reference to the English State trials will show that it was an innovation when a criminal trial was continued into a second day.* Now a criminal would hardly think himself to be well defended unless the trial were protracted through two or three days; and even the charge of the Court has been known to exceed that time, as in the Orton (or Tichborne) trial. The right to appeal, the chances of a new trial, the deliberations of

* Trial of William Stone in 1796. Vol. 25: 1295.

courts, especially in the case of a capital offence, put off punishment to such a time that its infliction seems to be a cruelty.

It used to be thought that old modes of practice gave opportunity to lawyers for postponing the end of litigation, and the Court of Chancery had to bear the blame for much of the delay experienced by suitors. Jarndyce against Jarndyce was a representation of the law's delay in its worst and most aggravating form. But the Court of Chancery has been abolished; the old practice has passed away. We have enjoyed several codes intended to facilitate the rapid disposal of business, but the delay remains. It is not necessary to go into detail or into statistics. It is enough to say briefly that the Supreme Court of the United States is hopelessly in arrears. In New York the Court of Appeals is falling behind with its business. Some of the General Terms are unable to keep up with the cases that come before them, and in many of the circuits and trial terms the business is similarly behindhand. One cannot begin a lawsuit that involves a considerable amount with any hope of a reasonably speedy decision. A year's time would be short for its termination; and the plaintiff may not reach the end in three, four, five, or six years. A short time since, counsel, in arguing a matter, referred to a case that had been pending eighteen years, and was just at an issue for trial. The case may be found reported as early as 1873,* in one of its many steps, and was in fact begun in 1869. It has graduated some of its counsel to the bench, and has seen several of the judges who have sat in it carried beyond the term of their judicial career; and I suppose it is not yet tried. Another case pressed forward by the plaintiff, and entitled to a preference on the calendars of the courts, was begun in 1874, and after four trials reached its happy end in 1880.† These are not unusual instances. If any one would see further detail on this point, he need only take a volume of the Reports of the Court of Appeals, and where a decision is made which is final, examine the statement and the other reports of the case, and ascertain when the case was begun. He will soon learn what the law's delay now is.

In civil matters the delay of justice is a great wrong. *Bis dat qui cito dat* is a maxim as true of law as of charity. Men can

* *Smith v. Rathburn*, 66 Barb., 402; 13 Hun, 47.

† *Cordell v. N. Y. C. & H. R. R. Co.*, 67 N. Y., 535; 70 N. Y., 119; 75 N. Y., 330; 79 N. Y., 636.

bear what they believe to be a wrong decision, if it be made promptly; but they cannot bear the uncertainties of delay. Hope deferred maketh the heart sick. It is the weary watching by a bedside, not the fatal termination, that tries mind and body. And so with a pecuniary claim that one man makes against another. When the case is decided, he accommodates himself to the result, favorable or not; but while he is in uncertainty there is no peace. The doubting Lord Eldons are the curse of suitors, and the case of *Peebles v. Plainstones* might well drive the weary plaintiff into a feeble lunacy. If a plaintiff must wait six or eight years for his rights, now encouraged by a favorable decision, and then disheartened by a reversal, until, after three or four trials and twice as many appeals, he succeeds at last, he will learn in the end that, on the whole, he would have been wiser never to have prosecuted his claim. He will ask himself sadly, what kind of justice is that which in expense costs as much as it gives, and in anxiety costs more. He will hardly feel satisfied, even if his counsel shall inform him that his case has afforded the opportunity to settle an important point of law, which previously had been uncertain. If the life of man had not been reduced in length since the days of Methuselah, a litigant might be content to spend ten years in having all the niceties of his case discussed and decided by lawyers and judges. But life is short; law is long.

Are there any causes of this delay that can be remedied? It is often, perhaps generally, the wish of the defendant in an action to postpone a final decision. There must be of course certain legal machinery and certain deliberation, in order that reasonable justice may be done. And as society becomes more wealthy and business affairs more complicated, it may be that more thought and deliberation are required in the decision of controversies. But there ought not to be too much opportunity for the defendant to protract the litigation; and if there be any way of bringing cases to a speedy decision, it should be sought. There has been an increased laxity in requiring parties to be ready when cases are called. Slight excuses are accepted more readily than they formerly were for the putting a case over to the next court. One cause for this may be in the difficulty of retaining witnesses in attendance. The expense of daily attendance is so large compared with the legal fees of witnesses that parties have some excuse for not bringing up

their witnesses until the day when it is certain they will be needed.

In some parts of New York there is, it may be, another cause that facilitates this putting of cases over to another term. In former times a circuit judge had a certain number of counties within which he was to hold his court. If he did not try a case at one circuit, he would find it waiting for him at the next. But, under the present system, circuits in the same county are held by different judges, and if a case is put over a circuit by the judge who holds it, he is generally relieving himself from the labor of trying that case. It will come before one of his brethren at the next circuit. So that, if he has the least desire to lessen his work, he has an opportunity to do so by putting cases over.

Another cause of delay in litigations in New York has been the practice of referring causes for trial. Partly owing to a deficiency in the judicial force, and partly to a willingness in judges to avoid labor, it has become far too common for lawyers to consent to refer causes which ought to be tried either before the court or before a jury. The evil is serious. References are very expensive, and the expense falls on the defeated party. They are always protracted; because the convenience of two or more counsel and of the referee must be consulted, and because the referee cannot exercise that power of compelling promptness which can be exercised by the court. Thus a trial, which before a court or jury might be finished in a few days, will, before a referee, last for months, by reason of short sessions and long adjournments. It is to be hoped that, since the recent increase in the number of judges, there will be a return to the practice when nothing was referred except long accounts. This increase of judicial force ought now to enable cases to be disposed of promptly at all the circuits and trial terms. It is certainly the duty of the State to provide a sufficient number of judges; so that, if they do their duty faithfully, there should be no delay in reaching a cause soon after it is ready for trial. But after the litigant has come to the trial of his cause and has a decision, he greatly deceives himself if he supposes that the litigation is ended. There are appeals and appeals before him.

“Hills peep o’er hills, and Alps on Alps arise.”

Perhaps there is no other cause of delay as great as the extensive right of appeal given by our present system. In many

matters that belong merely to the preliminary skirmishing, as it might be called, appeals to the General Term can be taken, with the result of delaying the trial — such matters, for instance, as motions to change the place of trial. Yet these are often questions to a great extent of good discretion, in which the discretion of one judge might better be made conclusive, for the sake of preventing delay. This, however, is of less importance than the freedom of appeal after trial. It may be said generally that, after a trial, the defeated party has three appeals, under any of which he may obtain a new trial. First, he may apply to the court before which the case was tried. If unsuccessful, he may appeal to the General Term. If unsuccessful there, he may appeal to the Court of Appeals. In the crowded condition of the calendars this assures him a very comfortable postponement of the final result. When, however, he shall at last have had his case decided by the highest court and shall have succeeded, and shall have obtained a new trial, he will not have reached the end. He must go back to try the case again. And, armed with the decision of the highest court in his favor, he will probably succeed in his defense at the trial. That, however, is not the end. The plaintiff will now appeal; and when the defendant once more reaches the highest court, he may find that there is a *distinguendo*, and that that court did not mean quite what he thought they meant.* Once more then there must be a new trial. And once more he may have to climb the ladder of appeals, and get a new lesson of wisdom from its topmost round,— at least a new lesson of patience.

The hardship arising from appeals has been increased under modern practice. When the Court of Chancery was in existence, and an action in equity had been carried to the highest court, the decision was final; there was no new trial. But now, whether an action be legal or equitable, if the judgment be not affirmed by the appellate court, there must, in nearly every case, be a new trial, with all the trouble and expense that this involves. It is seldom that the appellate court will, or can, make a final disposition, if it does not affirm the decision below. Thus, whatever complaint was made as to the delay in Chancery actions, the parties had the satisfaction of knowing that there was to be only one trial, and that, when the case should

* *Marston v. Swett*, 66 N. Y. 206, and S. C., 82 N. Y., 526. *Urquhart v. Ogdensburg*, 91 N. Y., 67, and S. C., MS., Nov., 1884.

reach the highest court, it would be ended. But now this advantage is gone; if there is an error in the trial the remedy is a re-trial. The appellate court will not, or cannot, rectify the wrong. And the result is that many cases are tried several times before they are ended. These re-trials not only cause delay, but they afford opportunity for that dangerous drilling and preparing of the witnesses by which on a second trial a party's evidence is made to appear better than it did on the first.

Whenever any suggestion is made as to restricting appeals, a feeling is manifested that it is the right of every citizen to carry every litigation to the highest court, however small the amount involved. This is not sound. All that a litigant can justly claim of the state is a reasonably fair and able tribunal, before which his case may be tried. Any tribunal may err. Appellate courts err. If there were ten successive appellate courts, the tenth would reverse decisions of the ninth. The highest must be assumed to be right only because there is none higher. It cannot be said that there is any absolute right at which the litigants will arrive after a certain number of appeals. The decisions of the Court of Appeals are conclusive, because usually there is no higher court. But when occasions come in which cases may go from that court to the Supreme Court of the United States, then their decisions are sometimes reversed. In fact, there are four legal doctrines on which the decisions of those two courts are antagonistic. Thus the litigant, in having several appeals allowed him, is not insured an absolutely just decision, for on many points there is no such absolute and unquestionable rule of right. And the decisions of courts are only the opinions of reasonable and sensible men. Whether, then, a litigant shall have the opinion of one man only, or shall have the opinion of three more, or of seven more, is not a matter of right. It is a question of expediency in the state, endeavoring to keep uniformity in its courts, and to do justice with promptness. And therefore the state may well consider how many appeals it shall allow; and further, whether it shall permit appeals where their expense is nearly equal to, or even greater than the amount involved. Thus, one remedy for the delay in legal proceedings is to restrict appeals. This may be done in several ways, which need not now be specified.

The chief objects to be gained though appellate courts is uniformity in decisions, a matter in which the state is interested,

and greater time for deliberation than can be had in the course of a trial. And yet it is often noticed by those who have had experience that the appellate court loses much of that knowledge of the real merits of the case which is possessed by the trial court. To the appellate court all witnesses seem alike; not so on the trial. And further, there is often an understanding between the court and the parties at the trial, which cannot be put upon paper, and which has much to do with the merits, and with a just decision. Hence, an appellate court, while it has more time for deliberation, sometimes misses the truth of the case.

The remark that there is often no unquestionable rule of right may excite surprise. But many questions arise on the meaning of a statute. Clearly that is a matter on which men may differ, and it cannot be settled by any rule of ethics. Often too, by the wrong-doing of one man, either the one or the other of two innocent men must suffer. Which shall suffer is not a matter of ethics. The disagreement between the Supreme Court of the United States and the Court of Appeals of New York on "town bonding" questions is of this character. Hence there is often no absolute rule of right; and where there is such a rule it is impossible to say how many appeals will reach it. No one then has a right to say that wrong has been done to him because the state has allowed him only one appeal instead of ten. There must be an end somewhere.

The manner in which appellate courts act on cases before them is often such as to cause unnecessary delay. The object of each action, so far as the parties are concerned, is to obtain what they believe to be their rights; they care nothing for the settlement of legal principles. But under our system, following the English, appellate courts seem at times to care more about making precedents than about deciding the case in hand justly. This comes from the fact, so often discussed, that our law is largely "judge-made" law. Instead of being guided by the rules of codes of law, or by a sound judgment as to the merits of the case, appellate courts are constantly searching for precedents in other cases, and are anxiously making a precedent out of the case in hand. When a case is argued, the question is not whether justice was done in the court below; but it may be whether some witness said something which might be considered irrelevant — perhaps no more important to the merits than whether he stood at right angles to the jury when he testified.

When we consider that an important trial may continue a week or more, and when we think how little of the testimony the jury remember at the end of the trial, it is laughable to observe appellate courts granting new trials because they cannot say that such a piece of evidence did not affect the jury. In fact, the jury are affected, not by single and special pieces of evidence, but by the general tone of the whole case, and much too by what may be called the atmosphere of the trial, which cannot be felt by the appellate court. But the memory of the jury cannot retain definitely all the answers that have been given to the questions of counsel; and in many instances, whether a question is answered, or whether the answer is excluded, the effect is the same. The jury know generally how the question would have been answered, and that knowledge is not excluded by the exclusion of the answer.

The system by which rules of evidence are rules of law* is, I suppose, peculiar to England and to countries that have inherited English law. Very probably it has its advantages; but it certainly has its disadvantages. One who was not familiar with it, might think it strange to hear the discussions in courts as to whether such and such evidence was admissible. He might think that if any evidence proved nothing it would be harmless; if it proved anything, it should be admitted. For instance, he might think if a doctor were sued for malpractice, it would be of some use to show that the doctor had never sent in a bill for his services, as this circumstance might be some indication that he thought them valueless. And one might be surprised to learn that such evidence, if admitted, would be fatal to the trial.† Those who are accustomed to the English system are often surprised at the freedom with which, in other systems, evidence is admitted; as if matters, however remote, should be allowed to come in so as to throw any light, if possible, on the controversy.

The English system has already been largely modified with respect to the persons who may testify. The old and unwise exclusion of all interested persons has been given up. Perhaps other changes will follow, touching the whole subject of relevant and irrelevant evidence. But meantime it would be a great improvement in the speedy administration of justice if appellate courts would lean toward a disregard, as far as possible,

* Best's Evidence, § 116.

† Baird v. Gillett, 47 N. Y., 186.

of any errors in the admission of evidence. Unfortunately, the tendency in New York has been in the opposite direction. Not merely in actions of a legal character, but even in those which we may still call equitable, strict rules of evidence have been enforced. And here the appellate courts seem to have overlooked the fact that the English system of evidence grew out of the trial by a jury, presided over by a judge. It is not, in its strictness, appropriate to trials by a court, and should not be extended to them. They should be left to a greater freedom, proper enough when the effect of evidence is to be weighed by a mind trained to judicial reasoning. Yet, however a cause may be tried, our appellate courts have not felt at liberty, even in actions of an equitable nature, to disregard improper evidence, if such had been admitted, and to decide the case upon the merits as shown in the evidence unquestionably proper.* This has been the cause of new trials and delay. And it has encouraged a practice sometimes called by counsel "trying a case for the exceptions"; that is, contriving as many ingenious pitfalls as possible, by offers of evidence and by exceptions to evidence and the like, in the hope, often well fulfilled, that the trial court would fall into some of these dangers, and that thus a client with no real defense might weary out his adversary by the delay consequent on an appeal.

And not merely in matters of evidence, but upon the whole merits of the case, appellate courts might well take broader views than they do; and if they see that, on the whole, justice has been done, they might wisely disregard errors even more important than those pertaining to evidence. An appellate court, of which the members never sit in the trial of cases, and thus never have any experience in that duty, will naturally form for itself a high standard of perfection. Such a court will have a faint idea of the perplexities that may surround a trial judge, endeavoring to hold a steady course between two ingenious counsel. It will scrutinize the language of a judge's charge, as if it were one of its own essay-like opinions. It is likely to forget that the jury did not pay precise and critical attention to every sentence of the charge, and that they are besides hardly capable of making the nice distinctions that are so easy to the acute legal mind. Of course, the only object of the judge's charge

* *Foot v. Beecher*, 78 N. Y., 155.

is to guide the jury. The charge is not intended to be an exact legal essay; and therefore, in reviewing it, the question must be whether the jury were in fact misled. This should be ascertained rather from the whole scope than from single sentences. Yet appellate courts sometimes overlook this idea, especially, if, for some cause, they wish to find, or make, a reason for reversing a judgment. Some incidental remark can be found in the charge, to which probably the jury never gave any attention, even if they understood its precise effect.

Perhaps this matter may be illustrated by instances taken from that class of cases, now so common, which arise in accidents at railroad crossings. In those cases, it is not proper for a judge to submit to a jury the question whether, under all the circumstances, the railroad company ought not to have had a flagman at the crossing.* Yet the judge may permit a jury to consider the absence of a flagman, or the question as to the care with which the company ran its trains.† If a jury are permitted to consider the presence or absence of a flagman as bearing on the question of the negligence of the company in running its trains, could they make the very nice distinction that they must not consider whether the company ought not to have had a flagman? Admit the beauty and delicacy of the distinction and the logical refinement that points it out; what does it matter practically to a jury? Their verdict will not be different whether one phrase or the other is used.

One other cause of legal delay may be briefly mentioned, with due deference to the judiciary, and that is, the writing of long opinions.

“ ’Tis pleasant, sure, to see one’s self in print.

A book’s a book, although there’s nothing in’t.”

Long opinions take up time in writing. And they cause another evil. Besides the point of law decided, there is often much in an opinion which is not decided, and is not law. These passages are caught up and used as if they were accurate statements and authoritative. They lead some lawyers astray, and they give occasion for the frequent comment of the reporter, distinguishing a case from one decided a short time before. A story is told of a layman who was appointed to a judicial position. He inquired

* *Hongwich v. Del. and Hud. Canal Co.*, 92 N. Y., 219.

† *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y., 522.

of a lawyer what he should do in this office, for which he had not been fitted by study. The lawyer, in reply, told him that his good sense would generally guide him aright in making decisions, but that, if he attempted to give reasons, he would fail. The danger of attempting to give reasons for a conclusion is sometimes seen, even in judges who have enjoyed a legal training.

I have thus specified several causes that tend to delay legal proceedings, and that deprive injured parties of that speedy redress which it is the duty of the state to give.

WILLIAM L. LEARNED.